assisted Marhom bin Oderi to do so. While they were unloading the van in front of No. 123, Kampong Bukit China, Special Constable Othman bin Rasip No. 10972, who was returning from rounds, passed by and he observed what was taking place. About 8.45 a.m. on the same day Mr. Haymes, an Assistant Customs Officer at Malacca, together with a party of Revenue Officers, raided No. 123, Kampong Bukit China, and in a room in that house they found three packages. Neither the appellant nor Marhom bin Oderi were present in the house at the time of the raid. Marhom bin Oderi, whose second wife was present in the room in which the packages were found, was then sent for, and after his arrival the three packages were opened in his presence. They were found to contain the goods set forth in the charge, and in respect of which Customs duty in the sum of $1,027.64 was payable on importation into the Federation of Malaya. These goods were then seized by the Customs raiding party, and Marhom bin Oderi was arrested. Later that morning, after having been cautioned, Marhom bin Oderi made a statement which was recorded by Mr. Haymes. On 2nd May, 1953 the appellant was arrested and charged. On the same day, after having been cautioned, he also made a statement which was recorded by Mr. Haymes. On the 27th May, 1953 a further statement from Marhom bin Oderi was recorded by Mr. Haymes. These statements were proved by the prosecution and put in evidence.

According to the statement made by Marhom bin Oderi regarding the three packages he, Marhom bin Oderi, was first approached by a friend of his while he was in the office of the Straits Times Publishing Co. to take some parcels of goods to Malacca. He was told that there were some playing cards in the parcels, and as he knew that there would be Customs duty payable on them at Johore Bahru he at first refused to take the parcel. He was then told that these parcels were already in Johore Bahru, and that all he was required to do was to pick them up at the Capitol Theatre there and to take them to his house in Malacca where a friend would later take delivery of them. There was no evidence that the appellant was present during this conversation or was later informed of it by Marhom bin Oderi.

According to the statement of the appellant on this point he stated that he was unaware of the contents of the parcels.

The sum total of the evidence for the prosecution against the appellant, therefore, was that he was the relief driver in a van in which were transported from Johore Bahru to Malacca three packages containing certain goods, that he did not know, and had no opportunity of getting to know, that the goods contained in these three packages were uncustomed goods, and that upon arrival in Malacca he assisted in unloading these three packages and taking them into the house occupied by the second wife of the other driver of the van.

The question, therefore, resolves itself into this, is that evidence sufficient to estabish "possession" of the uncustomed goods found in the three packages in the appellant? That they were in the possession of Marhom bin Oderi there can be no doubt, but was that possession exclusive to Marhom bin Oderi or was the appellant in joint possession thereof with him? I am clearly of opinion that on the evidence adduced by the prosecution the goods were not in the joint possession of the appellant and Mahom bin Oderi. It has frequently been held in this Court that mere juxtaposition is not enough to constitute possession. There must be something more. In *Toh Ah Loh and Mak Thim v. Rex*[3] Gordon Smith, Ag. C.J., delivering the judgment of the Court of Appeal, observed :—

> "Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing and lastly must be conscious of his possession of the thing."

The factors were clearly absent here. It follows that in my view there was no evidence before the learned President which would justify his amending the charge to one under section 114(c) (e) of the Customs Enactment, 1936.

For these reasons the appeal is allowed and the conviction and sentence must be set aside. The fine, if paid must be refunded to the appellant.

Appeal allowed.

Solicitor for the appellant: *C. S. Jayaswal.*

J. M. GOMES & CO. v. SAURAJEN VISVA NATHAN.

[A. C. J. (Bellamy, J.) October 12, 1953]

[Malacca — Civil Appeal No. 3 of 1953]

Practice and Procedure — Subordinate Courts Rules, 1950, O. 10, r. 3 — Failure to file defence within time — Solicitor's omission to file defence in time or obtain consent or an Order of the Court for an extension of time — Discretion of Court.

In this case on the return date of the summons the defendants (appellants) had not filed a defence, nor had they or their solicitor taken any step to obtain either the consent of the plaintiff's solicitors or an order of the Court for an extension of the time fixed by the Subordinate Courts Rules for filing their defence to, the claim. The case was tried by the learned President who, upon the application of the plaintiff's solicitors and after hearing the defendants and their solicitor on the matter, made an order that the defendants being in default of filing their defence as required by the Rules be precluded

from defending the claim; and, the plaintiff having proved his claim as far as it was necessary for him to do, the learned President gave judgment against the defendants for the amount claimed. An appeal from the order of the learned President precluding the defendants from defending the claim and to set aside the judgment was brought to the High Court.

It was argued that: (i) it is the accepted practice of the Courts to treat the return date of the summons as the date for mention only. In his ground of decision the learned President stated that he knew of no such accepted practice; (ii) the omission to file the defence in time was due to a mistake on the part of the defendants' solicitor in following what he believed to be the practice of the Courts as herein before stated.

Held: (1) even if there was evidence of such practice (and there was no such evidence before the learned President), such a practice could not override the express provisions of the rule as to the filing and service of the defence two days before the return date of the summons; (2) as the English authorities so clearly show, the defendants would not be the first to suffer by the mistake of their solicitor, and the principle to be deduced from the authorities is, that when a Court has such a discretion to be exercised it would exercise it upon the facts of each individual case, and that while a mistake on the part of a legal adviser is a factor to be taken into consideration by the Court, it is not necessarily a decisive factor. The defendants' solicitor's omission to file their defence in time or to obtain consent or an order from the Court for extension of such time is not sufficient cause to justify the Court in the exercise of its discretion in favour of the defendants.

Cases referred to:—

(1) *Jones v. Curling* (1884), 13 Q.B.D. 262, 271.

(2) *Gatti v. Shoosmith* (1939) 1 Ch. 841, 845; (1939) 3 All E.R. 916, 919.

CIVIL APPEAL.

S. Shunmugam for the appellants.

R. K. Booker for the respondent.

Cur. Adv. Vult.

Bellamy, J. : — This appeal involves a question of the exercise of the discretion of a subordinate Court in regard to the extension of the time fixed for filing a defence under Order X., r. 3, of the Subordinate Courts Rules, 1950. It arises in this way.

By a summons dated the 15th May, 1953 and issued by his solicitors, Mr. Saurajen Visva Nathan, who had been employed as a salesman by J. M. Gomez & Co., Merchants, of 34 Wolferstan Road, Malacca, brought an action in the Sessions Court at Malacca against his employers claiming a sum of $723.27 which he alleged to be due to him from them in respect of arrears of salary and allowances, one month's salary by way of damages for wrongful dismissal, and two months' deductions made by his employers while he was in their employment against the purchase price of a motor-car. This summons, which was returnable on the 29th May, 1953, was served upon the defendants on the 21st May, 1953. On the 26th May, 1953 the defendants instructed their solicitor in the matter and two days later, on the 28th May, 1953, he filed a memorandum of his retainer. On the return date of the summons the defendants had not filed a defence, nor had they or their solicitor taken any step to obtain either the consent of the plaintiff's solicitors or an order of the Court for an extension of the time fixed by the Subordinate Courts Rules for filing their defence to the claim. The case was tried by the learned President who, upon the application of the plaintiff's solicitors and after hearing the defendants and their solicitor on the matter, made an order that the defendants being in default of filing their defence as required by the Rules be precluded from defending the claim; and, the plaintiff having proved his claim as far as it was necessary for him to do, the learned President gave judgment against the defendants for the amount claimed. An appeal from the order of the learned President precluding the defendants from defending the claim and to set aside the judgment is now brought to this Court.

The question of the time for filing a defence is dealt with by Order X., r. 3(1), and by Order XXXVI., rr. 7 and 8. Order X., r. 3(1) reads as follows :—

> "If a defendant desires to defend the whole or any part of the claim he shall, not less than two days before the return date on the summons, or within such further time and on such terms as the Court may allow, file and cause to be served on each plaintiff a defence in Form 6. A set-off may be pleaded by way of defence."

Rules 7 and 8 of Order XXXVI read as follow :—

> "7. The Court may extend or abridge the time limited for doing any act, upon such terms as may be just, and notwithstanding that the time originally limited has expired.
>
> 8. Time for filing or serving any pleading, particulars, affidavit, notice or similar document may be extended by consent, unless in any case the Court shall otherwise order."

The language of these rules is clear and unequivocal. It seems to me to be inarguable that where a defendant desires to defend the whole or any part of the claim he must file and cause to be served on each plaintiff his defence, which includes a set-off, not less than two days before the return date on the summons, unless time has been enlarged by consent or by an order of the Court, and failure to comply with the time fixed for defence either by the rule itself or by consent or by order of the Court places the defendant in default of defence.

The governing rule where a defendant is in default of pleading is Order X., r. 7, which places in the discretion of the Court the power to direct that he shall be precluded from defending the claim. The Court's discretion is unfettered, and it seems to me that, unless the Court's discretion is exercised, in the language of Bowen, L.J in *Jones v. Curling*[1] in such a wrong way as to make it no

reasonable exercise of discretion at all, this Court will not interfere.

Now in the present case what were the facts upon which the learned President was called upon to exercise his discretion in favour of the defendants? Firstly, it was urged that it is the accepted practice of the Courts to treat the return date of the summons as the date for mention only. In his grounds of decision the learned President stated that he knew of no such accepted practice. I would go further and say that, even if there was evidence of the existence of such a practice (and there was no such evidence before the learned President), such a practice could not override the express provisions of the rule as to the filing and service of the defence two days before the return date of the summons. It appears to be that there was nothing in this point. Next it was urged that the omission to file the defence in time was due to a mistake on the part of the defendants' solicitor in following what he believed to be the practice of the Courts as hereinbefore stated. As the English authorities cited to me so clearly show, the defendants would not be the first to suffer by the mistakes of their solicitor; and the principle to be deduced from these authorities is, I think, that when a Court has such a discretion to be exercised it should exercise it upon the facts of each individual case, and that while a mistake on the part of a legal adviser is a factor to be taken into consideration by the Court, it is not necessarily the decisive factor. (See the observations of Sir Wilfred Greene, M.R. in the case of *Gatti v. Shoosmith*[2]). Was the defendants' solicitor's omission to file their defence in time or to obtain consent or an order of the Court for an extension of such time sufficient cause to justify the Court in the exercise of its discretion in favour of the defendants? I think not. The language of the relevant rules present no difficulties of interpretation whatsoever. If there was genuine difficulty in obtaining instructions from the defendants as to their defence it would not have been difficult to have communicated with the plaintiff's solicitors, who have an office in Malacca, either by letter or by telephone to obtain their consent for an extension of time for filing and delivery of defence; and if such consent had been withheld there was time before the return date of the summons in which to apply to the Court for an order of extension of time. Nothing of the kind was done. No defence to the claim was at any time disclosed, although it was suggested that the defendants had a set-off in respect of that part of his claim which related to the deductions in respect of the purchase price of a motor-car. If that be the case, no injustice would be worked by the learned President's order under Order X., r. 7, because it is still open to the defendants to bring an action against the plaintiff, if so advised, to recover that sum.

In my view the learned President exercised his discretion in this case properly, and consequently this appeal fails. The appeal is accordingly dismissed with costs.

Appeal dismissed.

Solicitor for the appellants: *S. Shunmugam.*

Solicitors for the respondent: *Allen & Gledhill.*

PUBLIC PROSECUTOR v. NAZARID FERNANDEZ.

[A. Cr. J. (Bellamy, J.) October 12, 1953]

[Malacca — Criminal Appeal No. 12 of 1953]

Penal Code, s. 193 — False evidence — Criminal Procedure Code, s. 123(2) — Examination of witness by police — Making false statement to a police officer.

Before a conviction can be sustained of making false statements to a police officer during the course of investigation, it must be proved that such statements were made in answer to questions put to the accused by an investigating officer.

Kandiah v. Rex[1] and **Beh Chai Eng v. Public Prosecutor**[7] followed. **Inder Singh v. Public Prosecutor**[2] dissented from.

Semble: It is well established that before a Court of the Federation of Malaya should accept as binding on it any decision of the Courts of the Colony of Singapore it should be satisfied that the law of the Colony is in **pari materia** with local law and that such a decision deals with the same problem as that which it is called upon to solve in the case in which such a decision is cited to it.

Cases referred to:—

(1) *P. Kandiah v. Rex* (1953) M.L.J. 64.

(2) *Inder Singh v. Public Prosecutor* (1940) M.L.J. 174.

(3) *Khoo Ee Liang & Ors. v. Lai Kim Tong & Ors.* (1947) M.L.J. 147.

(4) *Queen Empress v. Bhagwantia* I.L.R. 15 All. 12.

(5) *Empress v. Baikanta Bauri* I.L.R. 16 Cal. 349.

(6) *Ramamoorthy v. Public Prosecutor* (1948) M.L.J. 43.

(7) *Beh Chai Eng v. Public Prosecutor* (1950) M.L.J. 158.

CRIMINAL APPEAL.

L. A. Massie (Federal Counsel) for the appellant.

R. K. Booker for the respondent.

The facts and arguments appear sufficiently from the judgment.